116 (5) DEC 10, 2008

No. 08-058

IN THE
Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

SUSAN HAYS*
LAW OFFICE OF
SUSAN HAYS, P.C.
5646 MILTON AVENUE
SUITE 218
DALLAS, TEXAS 75206
(214) 557-4819

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400

**Counsel of Record*

COUNSEL FOR PETITIONER

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PETITION FOR REHEARING

This Court denied Shelby's Petition for Writ of Certiorari on November 17, 2008. Recognizing the extraordinary nature of rehearing, Shelby first seeks to have this Court reconsider its denial insofar as is necessary to hold his case in abeyance pending its forthcoming decision in *Yeager v. United States*, No. 08-67, as that matter involves the same divisive legal issue and stems from the same consolidated trial as Shelby's. Under the unusual circumstances presented here, holding Shelby's Petition is necessary to allow the Fifth Circuit to decide the issue on the merits with the benefit of this Court's decision in *Yeager*. Under that Circuit's formulation of the law of the case doctrine, this Court's decision will be available to Shelby on any subsequent appeal from a retrial. Thus, an abeyance in some form is essential to allow the Fifth Circuit to consider the merits without a second appeal and while it can still provide the remedy of avoiding a successive trial. Shelby has filed a Motion to Recall the Mandate in the Fifth Circuit and will apprise this Court of any ruling.

Second, Shelby's Petition presented a question of whether a defendant's burden on collateral estoppel review includes explaining theories not raised at trial, that is, explanations for the jury's verdict found outside the record which this Court may wish to examine in parallel with the question now granted in *Yeager*. Much like the question the three petitioners had in common, and this Court granted via Yeager's case, if Shelby is wrong on his second question then defendants can never succeed in a collateral estoppel

argument as some explanation may always be imagined outside the trial record. This Court should vacate its order denying Shelby's Petition and grant it on both questions presented.

I. By denying Shelby's Petition, this Court may subject him to law different from that applicable to his co-defendants.

Rex Shelby and two former colleagues, Joseph Hirko and F. Scott Yeager, were tried together in a three-and-a-half month trial on more than one hundred and fifty counts during the summer of 2005. As to each defendant, the jury returned a partial verdict of acquittal, acquitting on some counts but hanging on the remainder. All three filed Petitions for Writ of Certiorari to this Court seeking review of the lower court's ruling on the collateral estoppel effect of this partial verdict of acquittal. This Court has now granted Yeager's petition, No. 08-67, taken no action on Hirko's petition, No. 08-40, and denied Rex Shelby's, No. 08-58. *United States v. Yeager*, No. 08-67 (Nov. 14, 2008) (order granting petition); *United States v. Shelby*, No. 08-58 (Nov. 17, 2008) (order denying petition).

By denying Shelby's Petition, this Court opens the door not only for a retrial, but a retrial triggered by the application of a substantive legal standard different from that which will ultimately apply to his former colleagues and co-defendants. Shelby is set for trial on February 2, 2009, certainly before this Court acts on Yeager's Petition. Shelby has filed a Motion for Continuance in the district court and a Motion to Recall the Mandate in the United States Court of Appeals for the Fifth Circuit. Neither court has ruled on the respective motion before it.

The government opposed both motions, arguing that this Court's denial of Shelby's Petition reveals its view of Shelby's case, namely that no matter how Yeager's case is resolved, Shelby's collateral estoppel claim will have no merit. But a denial of a petition for writ of certiorari "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995). Rather than heed this Court's admonition, the government urges retrial before the law is settled.

Any decision by this Court on Yeager's Petition will announce a standard that could directly affect the Fifth Circuit's analysis in Shelby's case which the government tried on the same theory and before the same jury as Yeager. Shelby respectfully asks this Court to hold his Petition pending disposition of Yeager's case. While the Court has decided not to grant Shelby's Petition, its ruling in *Yeager* will be applicable under the Fifth Circuit's law-of-the-case principles, even if Shelby is forced to retrial in the interim. *Fuhrman v. Dretke*, 442 F.3d 893, 897 (5th Cir. 2006) (finding law-of-the-case doctrine inapplicable to issues affected by intervening, controlling authority). Thus, a decision to hold the case would preserve the Fifth Circuit's ability to determine what, if any, impact the *Yeager* decision would have, given its review of the record of the first trial. While any decision by this Court that would alter or clarify the test would be available to Shelby on appeal from any conviction in this case, he would be practically denied the opportunity to benefit from Double Jeopardy protections if he is tried before the Court's decision. Holding Shelby's Petition in the interim would avoid

the inefficiency of Shelby making his arguments in the trial court and on a second, plenary appeal after what may be an unnecessary second trial.

The rationale underlying the Double Jeopardy clause is the avoidance of multiple trials, not just the prohibition of multiple punishments. *E.g.*, *Abney v. United States,* 431 U.S. 651, 661 (1971) ("this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense."). Thus, assuming this Court grants relief in *Yeager* or at least clarifies the standard applicable to assertions of collateral estoppel, leaving Shelby to his retrial before the Fifth Circuit has the opportunity to apply that standard to Shelby is both unfair and contrary to the objective of avoiding multiple trials along with the more substantial objective of avoiding manifest injustice. *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983); *see also Fuhrman*, 442 F.3d at 892 (finding law-of-the-case bar may be inapplicable to avoid manifest injustice).

II. Unless this Court grants Shelby's Petition and its second question presented defendants will always fail in their assertion of collateral estoppel protections because a court can always imagine reasons for the jury's verdict outside the issues actually in contention at trial.

Because of the structure and logic of the Fifth Circuit's opinion, Yeager's Petition presents the most direct re-examination of the question of how a reviewing court should treat hung counts: ignore them or rationalize them. Yeager's Petition

presented this Court with one straight-forward issue, while Hirko's and Shelby's each added a distinct second question. Hirko's second issue concerned the treatment of compound offenses in collateral estoppel analysis. Shelby's second issue concerns the methodology of reviewing the trial record to determine whether fact issues decided by the jury can be discerned, and, if so, what the fact issues might be. Shelby contends that a reviewing court may not venture outside the trial record, that is, outside the evidence and arguments actually presented and made to the jury. In contrast, the Fifth Circuit reached out to a rationale not argued to the jury in the first trial to explain why the jury acquitted Shelby of his later-in-time insider trading counts while hanging on the earlier-in-time counts. The issue presented by all three defendants that this Court granted via Yeager's Petition applies only to cases of partial verdicts. Shelby's Petition adds this second question that is applicable to all collateral estoppel questions, no matter what the pattern of the first verdict. Because Shelby's second question will allow this Court to fully articulate a workable standard for collateral estoppel review, this Court should reconsider its decision to deny his Petition and instead grant it.

The issue the Court has granted, if the Fifth Circuit's rule stands, allows a logic that will always lead to a loss by the defendants. If hung counts must be considered in the collateral estoppel analysis, then a court may always rationalize that the jury did not find common facts in the defendant's favor, otherwise it would have acquitted on the hung counts. Given the Fifth Circuit's presumption of rationality in

looking at the verdict as a whole — including unanswered counts — a court will be compelled to find increasingly improbable assumptions to explain the failure to acquit. Because the burden to explain the jury's verdict rests on the defendant, the defendant will never be able to meet the burden if hung counts must be explained. Likewise, the second issue Shelby urges for review suffers at the hands of this coin-toss "heads I win; tails you lose" logic. If the reviewing court may wander outside the record to find an argument to explain a verdict, then a reason may always be found for why the jury did not find common facts in the defendant's favor.

Shelby's Petition presents the opportunity to address this second issue that will, if left unaddressed, box the defendant into an unwinnable position in all collateral estoppel analyses, not just those concerning partial verdicts: Does a defendant's burden reach to all arguments and inferences that *could be* made or drawn regardless of the government's theory and the facts in contention at trial? The Fifth Circuit, like the district court below it, looked outside the record to explain why the jury acquitted Shelby of his later-in-time insider trading counts by adopting a theory that was never raised at trial. *See* App. 9a-10a. This was not only in error, but also furthers a precedent that dooms defendants to failure and renders collateral estoppel protections ineffectual.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to both questions presented to enable this

Court to fully clarify the proper test for collateral estoppel review. In the alternative, the denial of Shelby's Petition should be vacated, and the Petition held pending resolution of Yeager's Petition.

Respectfully submitted,

SUSAN HAYS
LAW OFFICE OF
SUSAN HAYS, P.C.
5646 MILTON AVENUE
SUITE 218
DALLAS, TEXAS 75206
(214) 557-4819

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400

COUNSEL FOR PETITIONER

December 2008

RULE 44.2 CERTIFICAT

I, Susan Hays, counsel of record fo
pursuant to Rule 44.2, certify that th
Rehearing presents grounds limited t
circumstances of a substantial or contr
to other substantial grounds nc
presented. This Petition is presented
and not for delay.

Susan Hays